National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 17, 1998

TO: B. Allan Benson, Regional Director, Region 27

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: CF&I Steel, L.P., Case 27-CA-15562

524-5073-1114, 524-5073-1156

This Section 8(a)(3) case was submitted for advice on whether the Employer effectively discharged potential strikers when it falsely threatened that they would immediately be permanently replaced.

In June 1997, the parties began bargaining for a contract to replace the current agreement set to expire on September 30. Throughout the month of September, Employer supervisors committed many unfair labor practices by threatening numerous employees that, if they went out on strike, they would be discharged; would never work for the Employer again; wouldn't have their jobs; wouldn't come back to the mill; and would be treated as if they quit. In addition, in mid-September, a supervisor told two employees that 15 minutes after a strike, the Employer would have busloads of replacements and the employees would never work for the Employer again. Another supervisor told employees that (1) the Employer had replacements lined up if the employees struck; and (2) there were replacement waiting to replace any strikers. The Region is alleging that all these statements violated Section 8(a)(1).

On October 3, the Union went out on a strike which the Region has found to be an unfair labor practice strike from its inception. The Union ended the strike on December 30, 1997. The Union alleges that the Employer's September threats of immediate permanent replacement of strikers was clearly false because (1) the plant was closed during the early days of the strike; and in any event (2) since the strike was an unfair labor practice strike, strikers could not lawfully have been permanently replaced. The Union then argues that the Employer's false threats of permanent replacement converted the strikers into effective discriminatees under the rationale of Noel Corp., 315 NLRB 905 (1994).

We conclude, in agreement with the Region, that the discriminatees found in Noel Corp. are distinguishable from the instant strikers, who were not effectively discharged.

In Noel Corp., the employer learned at 8 p.m. that employees had voted to strike at midnight. The employer was able to obtain only 15 replacements by midnight, which apparently was a small minority of the total employee complement. In the interim, employer supervisors telephoned employees who were scheduled to report on the late shift to determine how many of them were staying out on strike. During these phone conversations, supervisors told employees that strikers would be permanently replaced. The employer also held a meeting of employees at the plant at around 10 p.m. and essentially announced that the employer had already hired striker replacements.

A Board majority found that the Employer made false statements conveying the message that replacements had already been hired. The Board then held that such statements effectively converted strikers into discriminatees, because false statements of permanent replacement unlawfully deprive strikers of the opportunity to return to positions which in fact are open.

The Board relied upon American Linen Supply[(1)] where similar false statements were made 10 minutes before a strike. The Board found that Board decision applicable, even though the false statements in Noel were made some two hours before the scheduled strike. The Board found that threatened night-shift employees, together with threatened day-shift employees scheduled to report to work at 6 a.m., were effectively discharged by these false threats. The Board emphasized the time sensitive nature of the threats and resultant violation:

The emphasis on a rapidly approaching deadline and the necessity to make a choice at that deadline indicated to employees that a choice to strike would result in immediate permanent replacement.11/

* * * * * * *

Footnote 11/: For this reason, our decision applies only to statements made to employees who were required to make a decision about striking at the midnight deadline or by the beginning of the morning shift some 6 hours later.

The Board specifically declined to find that later reporting employees who went out on strike had been effectively discharged by these threats:

Other employees were threatened [by the employer] but either were not scheduled to work the morning of [the strike] or worked that morning and joined the strike only later. Those individuals were not effectively discharged.

Id at 909, note 17.

We conclude that the strikers here are distinguishable from the discriminatees in Noel because the alleged false statements in this case were made weeks before the employees here went out on strike. These employees are akin to the late reporting strikers in Noel, and should be similarly treated as not effectively discharged.

Accordingly, the Region should dismiss this allegation, absent withdrawal.

B.J.K.

---

[1] 297 NLRB 137 (1989).